Supreme Court, U.S.
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No. 98-412

In The

Supreme Court of the United States

October Term, 1998

WARREN I. JACKSON,

Petitioner,

vs.

NCT CORPORATION and PFS CORPORATION, a joint venture d/b/a "HOECHST CELANESE POLYESTER INTERMEDIATES",

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

NCT Corp. and PFS Corp. operate as a North Carolina joint venture general partnership under the name of "Hoechst Celanese Polyester Intermediates." NCT Corp. and PFS Corp. are owned 100% by HCC Holdings, Inc., which is owned 100% by HNA Holdings, Inc., formerly known as Hoechst Celanese Corporation, which is a subsidiary of Hoechst AG, a publicly held entity in Germany.

NCT Corp. and PFS Corp. do not have any nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

The relevant facts have been set forth in Respondents' memorandum of law in support of summary judgment, which is reproduced in full in the Appendix to the pending petition for writ of certiorari. *See* A11-A56. In the interest of judicial economy, Respondents hereby incorporate by reference the statement of facts which is already of record before the Court. *See* A12-A23.

In addition to the foregoing, Respondents present the following procedural history to aid the Court in addressing the pending petition:

Petitioner Warren I. Jackson, a former employee of Cape Industries (a predecessor of the Respondents), filed this action on December 1, 1995 alleging that he was discriminated against on the basis of race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. *See generally* Complaint, A80.

On September 5, 1996, after the close of discovery, Respondents filed a motion for summary judgment, supported by a memorandum of law *(reproduced at A11-A56)* and exhibits. Petitioner filed a response in opposition to the motion for summary judgment on October 3, 1996 *(District Court Docket Entry No. 42)*, and Respondents filed a reply brief on October 15, 1996. *(Reproduced at A57-A74)*.

On October 29, 1996, the Honorable James C. Fox signed an order granting Respondents' motion for summary judgment. *(Reproduced at A4-A8)*. The order was filed on October 30, 1996, and the District Court entered judgment in the case pursuant to Judge Fox's order. *(Reproduced at A1-A3)*.

On November 8, 1996, Petitioner filed a motion captioned "Motion for Reconsideration," complaining about the manner in which the district court drafted the order granting summary judgment. (*District Court Docket Entry No. 46).* Respondents filed a response on November 19, 1996, pointing out, *inter alia*, that the District Court had explained the basis for the grant of summary judgment in sufficient detail. *(District Court Docket Entry No. 47).* Judge Fox denied Petitioner's motion for reconsideration by order dated December 17, 1996. *(Reproduced at A9-A10).*

Petitioner filed a Notice of Appeal on January 16, 1997 *(District Court Docket Entry No. 49)*, appealing the orders granting summary judgment on October 29, 1996 and denying the motion for reconsideration on December 17, 1996. The United States Court of Appeals for the Fourth Circuit affirmed the district court in a *per curiam* opinion issued on April 28, 1998. *(Reproduced at A77-A79).*

Petitioner filed a Petition for Rehearing With Suggestion for Rehearing En Banc on or about May 11, 1998. The Fourth Circuit denied the petition and suggestion for rehearing in an order filed on June 9, 1998. *(Reproduced at A75-A76).*

Petitioner filed the instant petition on or about September 9, 1998.

SUMMARY OF ARGUMENT

This case presents none of the considerations customarily required to warrant Supreme Court review, and is therefore a particularly inappropriate candidate for the exercise of this Court's certiorari jurisdiction. The courts below applied well-accepted legal principles to the evidence of record in determining that Respondents were entitled to summary judgment.

The district court entered summary judgment, and the Fourth Circuit affirmed, for the simple reason that Petitioner failed to present evidence sufficient to create a genuine issue of material fact regarding his claims of discrimination. In their briefs filed below, the parties cited numerous cases setting out the proper standard for addressing a motion for summary judgment in an employment discrimination action, the elements of a *prima facie* case, and the subsequent burdens of the parties in the event that a *prima facie* case is provisionally established.

Upon consideration of the facts of record and the controlling caselaw, the district court properly held that Respondents were entitled to summary judgment on the numerous grounds advanced in their summary judgment brief and reply brief. In particular, the district court noted that summary judgment should be entered because the court found "in the record no evidence that Plaintiff's disability was caused by unlawful discrimination or harassment on the part of the defendants." *See* A7. The district court therefore found, as Respondents had argued, that Petitioner failed to show that he had been subject to any adverse employment action, and failed to make out a *prima facie* case. *See* A25-A41.

Contrary to Petitioner's assertion, there is no conflict among the Circuits on any of the legal issues necessary to a determination of the underlying case. No Circuit court has held that an employment discrimination plaintiff can avoid summary judgment without presenting evidence to support each element of a *prima facie* case. Nor has any Circuit court held that, even after a *prima facie* case has been established, an employment discrimination plaintiff can avoid summary judgment without fulfilling the employee's burden of producing evidence to rebut an employer's articulation of a legitimate, nondiscriminatory reason for its actions. In short, the summary judgment entered in Respondents' favor was not based on a misunderstanding of

the controlling caselaw. Rather, summary judgment was properly entered as a result of, among other things, Petitioner's failure to meet his burden of producing evidence (a) to establish the elements of a *prima facie* case, and (b) to rebut Respondents' legitimate nondiscriminatory reason for their actions (assuming for the sake of argument that Petitioner had even established a *prima facie* case).

Petitioner advances the spurious argument that the district court's opinions did not identify the elements of a *prima facie* showing of employment discrimination. However, the district court clearly stated that its ruling was based on the reasons presented in the Respondents' briefs. Those briefs, in turn, cited numerous decisions which set out the elements of a *prima facie* case. Petitioner cannot seriously contend that the district court was unaware of the elements of a *prima facie* case.

Equally unavailing is Petitioner's argument that the district court based its decision on an assessment of Petitioner's credibility, rather than on the absence of supporting evidence in the record. Petitioner apparently bases this argument on the district court's statement that summary judgment was warranted for the reasons stated in Respondents' briefs. Clearly, the district court based its decision on the evidence and legal arguments presented in Respondents' motion, briefs, and exhibits — not on an improper resolution of any material factual dispute. Indeed, the district court correctly indicated that it "must view the facts in the light most favorable to the non-moving party, and draw all reasonable inferences in his favor." *See* A6, *citing Anderson v. Liberty Lobby*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986).

Finally, Petitioner has raised arguments in his petition for writ of certiorari which were not raised in the proceedings before the district court and the Fourth Circuit. To the extent

that the pending petition is based on arguments which were not timely raised below, this Court should not consider such arguments as a basis for granting certiorari.

Because this case presents no issue worthy of Supreme Court review, the petition for writ of certiorari should be denied.

REASONS FOR DENYING THE WRIT

I.

THE COURT SHOULD NOT GRANT CERTIORARI, SINCE THE COURTS BELOW CORRECTLY APPLIED WELL ESTABLISHED LEGAL PRINCIPLES TO THE FACTS OF RECORD IN GRANTING SUMMARY JUDGMENT.

Respondents' arguments in support of summary judgment are adequately set forth in the briefs reproduced in the Appendix to the petition, (*see* A11-A56, A57-A74), and will not be repeated here.

In addition to the evidence and arguments submitted to the district court below, Respondents state the following in response to the arguments raised in the petition for writ of certiorari.

A. Petitioner failed to establish a *prima facie* case of discrimination.

Respondents demonstrated to the district court that Petitioner failed to make out a *prima facie* case since he could not show that he was subject to any adverse employment action as a result of alleged discrimination. *See, e.g., United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714, 103 S.Ct. 1478, 1481, 75 L.Ed.2d 403 (1983). In an attempt

to convince this Court to grant certiorari, Petitioner makes two fact-based arguments that were properly rejected by the district court as lacking any evidentiary support, and also raises a new fact-based argument which was not presented to the district court. None of these arguments is a proper basis for Supreme Court review.

1. This Court should not grant certiorari to review the district court's finding that there was no evidence of record showing that Plaintiff's disability was caused by unlawful discrimination.

The first argument which Petitioner properly preserved at the district court level is a futile attempt to show that there is a genuine issue of material fact regarding whether or not Respondents' alleged discriminatory conduct caused the disability that forced Respondent to cease work and go on long-term disability leave. *See* Petition at 19. Petitioner relies exclusively on the Affidavit of Dr. Patterson, a former treating psychiatrist, in an attempt to show that Petitioner's depression was related to the environment he was in at Respondents' workplace. However, the district court correctly held that, notwithstanding Dr. Patterson's affidavit, the record contained "no evidence that Plaintiff's disability was caused by unlawful discrimination or harassment on the part of the defendants." *See* A7.

Contrary to Petitioner's mischaracterization of Dr. Patterson's affidavit, Dr. Patterson never stated in the record that Petitioner's depression was caused by alleged discrimination. In fact, Dr. Patterson wrote in a June 18, 1993 letter:

> I am recommending that he [Mr. Jackson] seek employment outside of the petrochemical industry.

See A40.

The fact that Dr. Patterson recommended that Petitioner leave the petrochemical industry altogether demonstrates conclusively that Dr. Patterson believed Petitioner's problems were caused by general stresses that would be present in any job in the industry, rather than by alleged unlawful discrimination occurring at Respondents' workplace. Dr. Patterson's apparent belief that Petitioner's condition was in some way related to his work environment thus reflected general concern for Petitioner's ability to function in any engineering job in the petrochemical industry. None of Dr. Patterson's statements can be interpreted as an opinion that Petitioner's depression was caused by alleged discrimination. As the district court properly recognized, there was simply no evidence from which a trier of fact could find a causal link between Petitioner's disability and alleged discrimination.

2. There was no evidence of record showing disparate treatment in Petitioner's compensation.

The second argument that was properly rejected by the district court is that there was "disparate treatment in terms of petitioner's compensation." *See* Petition at 17. Petitioner argues to this Court that he was precluded from receiving a bonus and cost of living increase due to an October 1992 decision to rate his performance as "requires improvement." *Id.*

Petitioner's argument fails, however, since the undisputed evidence shows that he had not formally been rated "Requires Improvement" as of October 27, 1992, when he went on disability leave. As shown by the deposition testimony of Petitioner's direct supervisor, Miguel Chen, a 1992 year-end performance evaluation that would have rated Petitioner as "Requires Improvement" was prepared in January or February 1993, but was never administered due to Petitioner's absence from work. *See* A63.

Petitioner misleadingly cites to a portion of a deposition of Ken Stach (Petitioner's second line supervisor) in a further attempt to create a genuine factual issue on the question of whether Petitioner had been given a "Requires Improvement" rating in October 1992. However, Mr. Stach never testified that Petitioner was formally rated as "Requires Improvement." Rather, Mr. Stach testified that the performance review prepared in early 1993 "***would have*** resulted in a Requires Improvement" but was not administered since "the employee was out on leave." *See* A122, Lines 17-20. It is clear, therefore, that Petitioner had not been given a Requires Improvement rating as of October 1992.

In any case, Petitioner's job performance in October 1992 is not material to the issue of whether he was subject to an adverse employment action which affected his compensation. The undisputed evidence shows that raises and bonuses were not awarded until after the end of each calendar year, and it was Respondents' policy not to give raises or bonuses to an employee on leave until that employee returned to work. *See* A64-65. Thus, even if a decision had been made to rate Petitioner as "Requires Improvement," this would have had no effect on his compensation. Under Respondent's policy, Petitioner's salary would have remained constant and he would not have received a bonus until his return to work, which never occurred. *Id.*

3. Petitioner did not argue below that "functional isolation" constituted an adverse employment decision.

The argument that Petitioner failed to preserve by presenting it first to the district court and the Fourth Circuit is that the "functional isolation" of Petitioner constituted an adverse employment action under Title VII. *See* Petition at 14. It is an accepted rule of appellate procedure that ordinarily an

appellate court will only consider issues raised in the court from which the appeal is taken. *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976). "[I]ssues raised for the first time on appeal generally will not be considered." *Muth v. U.S.*, 1 F.3d 246, 250 (4th Cir. 1993).

Petitioner did not argue to the district court that functional isolation was an adverse employment action in this case. In fact, Petitioner's brief in opposition to the Respondents' motion for summary judgment did not even use the term "functional isolation." *See District Court Docket Entry No. 42.* Nor did Petitioner argue in any of his briefs filed with the Fourth Circuit that he could meet the adverse employment action prong of a *prima facie* case by showing that he was required to work in "functional isolation."

Because Petitioner failed to raise this argument at any juncture below, it would be an inappropriate basis for review by this Court on a writ of certiorari.

B. The result in this case was not affected by a purported split among the Circuits with regard to what a plaintiff must show to survive a summary judgment motion.

Summary judgment in this case was indisputably proper, since Petitioner had failed to establish a *prima facie* case of discrimination, as explained above. Even assuming, for the sake of argument, that Petitioner had made out a *prima facie* case, Petitioner is incorrect in asserting that the Fourth Circuit's "required showing for a Title VII plaintiff to defeat an employer's summary judgment motion is in conflict with this Court and other circuits." *See* Petition at 5. Contrary to Petitioner's claim, there is not a split among the Circuits regarding whether an employee's *prima facie* showing would be sufficient to avoid summary judgment in the face of an

employer's proffer of evidence demonstrating a legitimate, nondiscriminatory reason for its actions.

Petitioner correctly states the general rule that a plaintiff must establish a *prima facie* case, and then raise a genuine issue of material fact with regard to an employer's proffered legitimate business reason. *See, e.g., Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1321 (10th Cir. 1997); *Randall v. City of Aurora*, 69 F.3d 441, 451 (10th Cir. 1995); *Ingels v. Thiokol Corp.*, 42 F.3d 616, 622 n.3 (10th Cir. 1994); *Beall v. Abbott Lab.* 130 F.3d 614, 619 (4th Cir. 1997), *cited* in Petition at 6-7.

However, Petitioner is incorrect in his assertion that the Sixth Circuit holds that an employment discrimination plaintiff can — in all cases — defeat a motion for summary judgment merely by establishing a *prima facie* case. The case cited by Petitioner for this proposition, *EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 861 (6th Cir. 1997), is not nearly so sweeping as Petitioner implies. While *Avery Dennison* does state, in *dicta*, that a defendant is not entitled to summary judgment if a plaintiff has proven its *prima facie* case, the decision involved the proper framework for evaluating evidence at a trial on the merits, rather than at the summary judgment stage. *Id.* at 860-61.

In other decisions which specifically address the standard for granting summary judgment, the Sixth Circuit has, in fact, indicated that summary judgment could be granted in the face of a *prima facie* showing, where the defendant articulates a legitimate nondiscriminatory reason and the plaintiff fails to offer contrary evidence. For example, in *Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1227 (6th Cir. 1996), the Sixth Circuit denied a defense motion for summary judgment on the basis that the plaintiff presented evidence that the defendant's proffered reasons for its actions were pretextual. *Id.* Had the

law in the Sixth Circuit been — as Petitioner has asserted — that a *prima facie* showing was all that was required to avoid summary judgment, the *Ensley-Gaines* decision would not have had to discuss whether the plaintiff had presented further evidence beyond its *prima facie* case.

The decisions from the Tenth and Fourth Circuits cited by Petitioner at pages 6-7 of his Petition, holding that a mere *prima facie* showing of discrimination is insufficient to avoid summary judgment where the employer has articulated a non-discriminatory reason for its actions, are fully consistent with the decisions of this Court. In *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), the Court held that after a plaintiff establishes a *prima facie* case and the defendant produces admissible evidence in rebuttal, the plaintiff then retains the "ultimate burden of persuading the trier of fact that defendant intentionally discriminated against the plaintiff." *Id.*, 450 U.S. at 253. The Court further held that "assessing the burden of production helps the judge determine whether the litigants have created an issue of fact to be decided by the jury." *Id.*, at n.8. Thus, it is the full analysis of burdens of production under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973), which allows a district court to determine whether summary judgment is appropriate. A court cannot deny summary judgment merely on the basis that a plaintiff has fulfilled his initial burden of establishing a *prima facie* case, if the plaintiff cannot also present evidence to rebut an employer's proffer of a legitimate, nondiscriminatory reason for its actions. *See, e.g., Blue v. U.S. Dept. of Army*, 914 F.2d 525, 535 (4th Cir. 1990), *cert. denied*, 499 U.S. 959, 111 S. Ct. 1580, 113 L.E.2d 645 (1991) ("The cases in which summary judgment has been granted a Title VII defendant, even after plaintiff was able to establish a *prima facie* case of discrimination, are numerous.").

Even if Petitioner had been able to make out a prima facie case, he presented no evidence to carry his "ultimate burden of proving that the employer intentionally discriminated against him." *Cook v. CSX Transportation Corp.*, 988 F.2d 507, 511 (4th Cir. 1993). Petitioner's argument that entry of summary judgment was improper due to his establishment of a *prima facie* case is both legally and factually flawed, and therefore does not provide a basis for Supreme Court review.

II.

THE DISTRICT COURT WAS WELL AWARE OF THE ELEMENTS OF A PRIMA FACIE CASE.

Petitioner advances the spurious argument that the district court did not consider whether or not plaintiff had made a *prima facie* showing, since it did not explicitly identify the elements of a *prima facie* case in its opinion. *See* Petition at 12. However, the district court clearly stated that its ruling was based on the reasons presented in the Respondents' briefs. *See* A7. Those briefs, in turn, cited numerous decisions which set out the elements of a *prima facie* case. *See, e.g.*, cases cited at A24-A28. In light of the district court's statement that it had "carefully reviewed the motion for summary judgment and supporting materials, and the materials submitted by the plaintiff in opposition to the motion, as well as the entire file," (*see* A6), Petitioner cannot seriously contend that the district court was unaware of the elements of a *prima facie* case.

Petitioner complains, particularly, that the district court did not set forth the legal elements for establishing a *prima facie* case of discrimination under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *See* Petition at 11. The district court's failure to repeat the standard for a *prima facie* case is immaterial, since the court

clearly applied the standard. The district court indicated that its ruling was based on the Respondents' briefs, which cited numerous cases discussing the *McDonnell Douglas* model of addressing employment discrimination claims. *See, e.g., Crady v. Liberty National Bank & Trust Co.*, 993 F.2d 132, 134-135 (7th Cir. 1993) (discussing *McDonnell Douglas* and *Burdine*; cited at A26); *Ballinger v. North Carolina Agricultural Extension Service*, 815 F.2d 1001, 1005 (4th Cir.), *cert. denied*, 484 U.S. 897, 108 S.Ct. 232, 98 L.Ed.2d 191 (1987) (same; cited at A24); *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 238-41 (4th Cir. 1982) (same; cited at A26); *Page v. Bolger*, 645 F.2d 227, 229-230 (4th Cir.), *cert. denied*, 454 U.S. 892, 102 S.Ct. 388, 70 L.Ed.2d 206 (1981) (same; cited at A26).

The courts below were clearly aware of and correctly applied the governing legal principles to the evidence of record. Petitioner may not blindly presume that there was error below in the hope that this Court will revisit the same issues which have already been addressed by the district court and the Fourth Circuit. *Cf. Cornelius v. Nutt*, 472 U.S. 648, 658, 105 S. Ct. 2882, 2888, 86 L.Ed.2d 515 (1985) ("The burden is upon the appellant to show that based upon the record as a whole the error was harmful, *i.e.*, caused substantial harm or prejudice to his/her rights.").

III.

THE DISTRICT COURT DID NOT RELY ON A DETERMINATION OF PETITIONER'S CREDIBILITY.

Petitioner further asserts that certiorari is warranted to prevent the "practice of relying upon an employer's arguments . . . prior to a court rendering its decision on a matter of law." *See* Petition at 20. This argument does not provide a valid ground for Supreme Court review, and scarcely merits response.

The district court properly applied the established rule governing summary judgment motions that a "court must view the facts in the light most favorable to the plaintiff as the non-moving party, and draw all reasonable inferences in his favor." *See* A6, *citing Anderson v. Liberty Lobby*, 477 U.S. at 255. The district court made no credibility determinations in granting summary judgment. Rather, the court found that summary judgment was proper under Fed. R. Civ. P. 56(c), since the evidence of record showed "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *See* A6. The district court correctly observed that Petitioner failed to present evidence of record to support his allegations of racial discrimination. *See* A6-A7. The district court made no credibility determinations, since Petitioner failed to raise any genuine issue of material fact that needed to be resolved prior to entry of judgment as a matter of law.

The Supreme Court's rules state that a petition for writ of certiorari "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Rule 10, Rules of the Supreme Court of the United States. There is no question that the district court properly stated the standard for granting summary judgment. *See* A6. While Petitioner disputes the district court's application of this rule of law to the evidence of record, Petitioner's arguments are limited to the specific facts presented by this particular case, and do not warrant the extraordinary exercise of certiorari jurisdiction.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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